

**TEXAS ALCOHOLIC BEVERAGE  
COMMISSION, PETITIONER**

**AKLILU HARVEY D/B/A  
DES DES CAFE & BAR, RESPONDENT  
PERMIT NOS. MB-507604, LB-507605,  
PE-508264**



## ADMINISTRATIVE HEARINGS

TABC has jurisdiction over this matter under Subchapter B of Chapter 5, §§ 26.03 and 61.71 *et seq.* of the Texas Alcoholic Beverage Code, TEX. ALCO. BEV. CODE. ANN. § 1.01 *et seq.*, TEX. GOV'T. CODE ANN, § 2001 *et seq.* The State Office of Administrative Hearings. has jurisdiction over all matters related to conducting a hearing in this proceeding, including the preparation of a proposal for decision with proposed findings of fact and conclusions of law, pursuant to TEX. GOV'T CODE ANN. Ch. 2003.

Notice and jurisdiction were not contested and are addressed only in the Findings of Fact and Conclusions of Law.

On May 26, 2006, a hearing convened before SOAH ALJ Rex Shaver at the SOAH office located at 2020 N. Loop West, Suite 111 Houston, Texas 77018. The Petitioner was represented at the hearing by Ramona Perry, TABC Staff Attorney. Respondent appeared in person and was represented by his attorney, Lee Van Richardson. Following the presentation of evidence and argument the hearing concluded with the record remaining open for the filing of memorandum and briefs through June 9, 2006.

## II. APPLICABLE LAW

Pursuant to TEX. ALCO. BEV. CODE ANN. § 61.71 (a) (1) TABC may suspend or cancel a mixed beverage permit if it finds after notice and hearing:

[T]hat the licensee violated a provision of this code  
or a rule of the commission during the existence of  
the license sought to be cancelled or suspended.

Further, pursuant to TEX. ALCO. BEV. CODE ANN. § 28.08:

### REFILLING CONTAINERS PROHIBITED

No holder of a mixed beverage permit may refill with any substance  
a container which contained distilled spirits on which the tax prescribed in  
Section 201.03 of this code has been paid.

Further, pursuant to TEX. ALCO. BEV. CODE ANN. § 201.02 defines

“first sale” in part: ... first actual sale by the permittee to the  
holder of any other permit....

Further, pursuant to TEX. ALCO. BEV. CODE ANN. § 201.03

TAX ON DISTILLED SPIRITS. (a) A tax is imposed on the first sale of distilled spirits....

### **III. PETITIONER'S EVIDENCE**

#### **A. Documentary Evidence:**

##### **TABC Exhibit 1: Respondent's Permit and License History**

Respondent holds a Mixed Beverage Permit MB-507604 and Mixed Beverage Late Hours Permit LB-507605, for the premises located at 8282 Bellaire Boulevard '120', Houston, Harris County, Texas. The permits were originally issued on January 2, 2002, and have been continuously renewed. This exhibit makes no mention of Permit PE-508265.

##### **TABC Exhibit 2: Agreement and Waiver of Hearing May 11, 2006.**

This document was too recent to be included in Exhibit 1. Settlement of a Permit consumption during prohibited hours charge.

##### **TABC EXHIBIT 3: U.S. Postal Service Certified Mail Receipt.**

This receipt is for the original notice of hearing.

##### **TABC EXHIBIT 4: Texas Alcoholic Beverage Commission, Seized Property Report.**

A record of seven bottles seized on June 22, 2005, at the Des Des Cafe & Bar, describing size, number, kind, brand name, and proof/percent.

#### **B. Testimony Regarding the Alleged Violation:**

(1) Paul Hindman testified that on June 9, 2005, he was an enforcement agent with TABC and was investigating a complaint that Respondent was selling mixed drinks without a permit. He

and another agent entered the premises and looked for and found a properly posted sales permit. Having cleared that complaint, Mr. Hindman began a routine inspection of the bottles in the service area.

Agent Hindman began looking to see if each of the bottles had a local distributor stamp and determined that the stamps were present. He also looked for impurities inside of the bottles. He would do this by picking up each bottle, shaking it and shining a flashlight through the bottle to see if impurities such as flies or spiders could be seen. He could not recall finding any impurities in the 30 or so bottles that were present in the service area. While inspecting the bottles he noted that some were sticky to the touch and that some white distributor stamps and bottle labels appeared to have been damp at some time. His past experience was that these clues often indicated that bottles were being refilled. To determine this he used a light wave specific marking device to mark the fluid level on a number of bottles. He marked the label when possible or the glass bottle itself when necessary. The ink in the marking device is not visible to the naked eye but is only visible in specific light waves. Having cleared the original complaint he left the premises.

On June 22, 2005, Mr. Hindman returned to the licensed premises. He began inspecting the liquor bottles in the service area using a wave specific light source. During this inspection he determined that seven of the bottles of liquor which he had marked during the June 9, 2005, inspection, now, had higher fluid levels than at the time of that inspection. He pulled these seven bottles and set them aside. He then told an employee that he needed to speak with the owner or manager. A short time later Mr. Aklilu Harvey came to the premises. Mr. Hindman showed Mr. Harvey the seized bottles and told him that he had suspicions that the bottles had been refilled. He asked Mr. Harvey if he knew if the bottles had been refilled and Mr. Harvey responded that he had refilled those bottles.

The seven seized bottles were produced at the hearing and were identified by Mr. Hindman as the same bottles he had marked and seized on the June 22, 2006 inspection. He then read the labels identifying the original contents as Johnny Walker Black whiskey, Grey Goose vodka, Absolut

vodka, Absolut Kurant vodka, Hipnotiq liqueur, Bacardi rum and Hennessy cognac. He testified that all seven brands were distilled liquors.

#### IV. RESPONDENT'S EVIDENCE

Respondent presented no documentary evidence or testimony. The Respondent and Petitioner stipulated that the bottles had been refilled.

#### V. ANALYSIS

That Respondent Aklilu Harvey was a holder of two Mixed Beverage Permits at the time of the alleged violation was shown by the documents provided and was never disputed. That the containers were for distilled spirits was never disputed. That Respondent had refilled the bottles was stipulated by the parties. Respondent relied upon the point that no one could know what was in the bottles when they were refilled. A close reading of the TEX. ALCO. BEV. CODE ANN. § 28.08 indicates that “no holder of a mixed beverage permit may refill with any substance a container *which contained* ( emphasis provided) distilled spirits.” It is not necessary that Petitioner show that the containers had distilled spirits in them at the time they were refilled, only that they had been containers for distilled spirits at some time. Mr. Hindman testified that his experience and training had taught him to identify distilled spirits and their containers. The seven seized bottles were, in his opinion, containers for distilled spirits.

That the containers had held distilled spirits upon which the first sale tax called for in TEX. ALCO. BEV. CODE ANN. §§ 201.02 and 201.038.08 was established by the testimony of Mr. Hindman. He noted that the bottles he inspected and later seized all had the white local distributor stamp affixed. The presence of this stamp indicates that taxes have been paid. The absence of this stamp has been noted by Texas courts as an indicator that taxes have not been paid.

## VI. PROPOSED FINDINGS OF FACT

1. Aklilu Harvey d/b/a Des Des Cafe & Bar (Respondent) holds Mixed Beverage Permit, MB-507604, and Mixed Beverage Late Hours Permit 507605, issued by the Texas Alcoholic Beverage Commission (TABC), for the premises located at 8282 Bellaire Boulevard, '120', Houston, Harris County, Texas.
2. These permits were issued by the Texas Alcoholic Beverage Commission, on January 2, 2002, and have been continuously renewed.
3. On June 22, 2005, TABC Agent Paul Hindman detected that seven bottles in the service area of Des Des Cafe & Bar had fluid levels indicating an addition of some substance to the bottle.
4. On June 22, 2005, Respondent Aklilu Harvey told Mr. Hindman that he was the person who had refilled the bottles.
5. The bottles seized at the Des Des Cafe & Bar were containers for distilled spirits.
6. On March 20, 2005, Petitioner issued its notice of hearing directed to Respondent at the mailing address provided by Respondent.
7. The notice contained a statement of the time, place, and nature of the hearing; a statement of the legal authority and jurisdiction under which the hearing was to be held; a reference to the particular sections of the statutes and rules involved; and a short, plain statement of the matters asserted. Notice and jurisdiction were not contested.
8. On May 26, 2006, a hearing convened before State Office of Administrative Hearings (SOAH) Administrative Law Judge Rex Shaver at the SOAH field office located at 2020 North Loop West, Suite 111, Houston, Harris County, Texas.
9. Petitioner was represented at the hearing by Ramona Perry, TABC Staff Attorney. Respondent appeared in person and by counsel Lee Van Richardson, Jr.
10. On May 26, 2006, following presentation of evidence and argument of counsel, the hearing was concluded and the record remained open until June 9, 2006 for the filing of memoranda and briefs after which time the record would close.

**VII. PROPOSED CONCLUSIONS OF LAW**

1. TABC has jurisdiction over this matter. TEX. ALCO. BEV. CODE ANN. SUBCHAPTER B ch. 5 and §§ 61.71 (a) (1) and 28.08.
2. SOAH has jurisdiction over all matters related to conducting a hearing in this proceeding, including the preparation of a proposal for decision with proposed findings of fact and conclusions of law. TEX. GOV'T CODE ANN. ch. 2003.
3. Proper and timely notice of the hearing was effected on all parties pursuant to the Administrative Procedure Act, TEX. GOV'T CODE ANN. CH. 2001, and 1 TEX. ADMIN. CODE § 155.55.
4. Respondent was the holder of a mixed beverage permit on June 22, 2005.
5. Respondent refilled containers which had contained distilled spirits, in violation of § 28.08 of the Code.
6. The ALJ agrees with the staff and recommends that Respondent's permits be cancelled. TEX. ALCO. BEV. CODE ANN. § 61.71 (a) (1) and 16 TEX. ADMIN. CODE § 37.60.

**SIGNED August 3, 2006.**

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**REX A. SHAVER**  
**ADMINISTRATIVE LAW JUDGE**  
**STATE OFFICE OF ADMINISTRATIVE HEARINGS**